Supreme Court, U.S.
FILED
07-261 AUG 27 2007
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

LIFE PARTNERS, INC.,

Petitioner,

v.

THEODORE V. MORRISON, JR., in his official capacity as Commissioner of the Virginia State Corporation Commission, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The McCarran-Ferguson Act removes dormant Commerce Clause restrictions on state laws that regulate the "business of insurance." 15 U.S.C. § 1012(a). Unfortunately, "[d]efining 'insurance' for McCarran-Ferguson purposes has been an enduring problem" for lower courts. *Adams v. Plaza Fin. Co.*, 168 F.3d 932, 942 (7th Cir. 1999) (Easterbrook, J., dissenting). The Fourth Circuit exacerbated this "enduring problem" by holding that a state law purporting to regulate viatical settlements regulates the "business of insurance" under the McCarran-Ferguson Act. The Fourth Circuit reached this conclusion even though viatical settlements do not involve insurance companies. Instead, they are agreements in which an insured sells the right to receive benefits under a previously issued life insurance policy to a third party. The question presented is whether the Virginia Viatical Settlements Act regulates the "business of insurance" under the McCarran-Ferguson Act, notwithstanding the fact that a viatical settlement is not a transaction between an insurance company and an insured.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Mark C. Christie and Judith Williams Jagdmann, in their official capacities as Commissioners of the Virginia State Corporation Commission, and Alfred W. Gross, in his official capacity as Virginia Commissioner of Insurance, were defendants-appellees below and are respondents in this Court; Robert F. McDonnell, in his official capacity as the Attorney General of the Commonwealth of Virginia, was an intervenor-appellee below and is a respondent in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Life Partners Holdings, Inc., is the parent corporation of Life Partners, Inc., and that no other publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Life Partners, Inc., respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 484 F.3d 284. Pet. App. 1a. The order denying the petition for rehearing en banc is unreported. *Id.* at 72a. The opinion of the United States District Court for the Eastern District of Virginia is reported at 420 F. Supp. 2d 452. *Id.* at 39a.

JURISDICTION

The district court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on April 30, 2007. It denied petitioner's timely petition for rehearing en banc on May 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the McCarran-Ferguson Act (15 U.S.C. § 1012) provides:

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That ... [the Sherman Act, Clayton Act, and Federal Trade Commission Act] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

The Virginia Viatical Settlements Act is set forth in Appendix D. Pet. App. 75a.

STATEMENT

This case affords the Court the opportunity to provide States and lower courts with much-needed guidance regarding the scope of Section 2(a) of the McCarran-Ferguson Act. 15 U.S.C. § 1012(a). For decades, decisions from this Court and lower courts have confined Section 2(a) to state laws that regulate transactions between an insurer and an insured. In conflict with those decisions, the Fourth Circuit held that the Virginia Viatical Settlements Act regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act, even though the Virginia law does not regulate an insurer-insured transaction but instead regulates a third party's purchase of the right to receive benefits under an existing life insurance policy (a transaction known as a "viatical" or "life" settlement).

The Fourth Circuit's decision expands the scope of the McCarran-Ferguson Act to reach transactions that are only peripheral to the insurer-insured relationship that rests "at the core of the McCarran-Ferguson Act's concern." *Barnett Bank of Marion*

County, N. A. v. Nelson, 517 U.S. 25, 39 (1996). In so doing, it insulates from the dormant Commerce Clause a vast number of state laws that—like the Virginia Viatical Settlements Act—significantly burden or discriminate against interstate commerce. The decision therefore has far-reaching implications not only for the multibillion-dollar viatical and life settlement market, but also for all other companies that provide services to insurers and insureds and that seek to enter into interstate transactions unimpeded by States' extraterritorial regulations. The inevitable result of the Fourth Circuit's holding will be a proliferation of state laws that substantially restrict the ability of terminally ill people and senior citizens to transfer their life insurance benefits in interstate transactions to pay for essential medical care and other end-of-life expenses.

This Court's review is warranted to alleviate the circuits' confusion regarding the definition of the "business of insurance" under Section 2(a) of the McCarran-Ferguson Act and to clarify the scope of the States' authority under that statute to enact otherwise unconstitutional laws that regulate out-of-state business activities only marginally connected to the insurer-insured relationship.

1. The McCarran-Ferguson Act

Congress enacted the McCarran-Ferguson Act in 1945 to ensure that the States' historical primacy in the field of insurance is not undermined by the restrictions that the dormant Commerce Clause imposes on the regulation of interstate commerce or inadvertently supplanted by generally applicable federal laws not enacted with the peculiar concerns of the insurance industry in mind.

Throughout the nineteenth and early twentieth centuries, this Court repeatedly held that "[i]ssuing a policy of insurance [was] not a transaction of commerce" (*Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869)), and the regulation of insurance transactions was therefore thought to rest within the exclusive purview of the States. That understanding was unsettled, however, by this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), which held that insurance transactions do constitute commerce and are subject to federal statutes, including the antitrust laws, enacted pursuant to Congress's Commerce Clause authority.

Congress responded to *South-Eastern Underwriters* by enacting the McCarran-Ferguson Act to provide for "the continued regulation and taxation by the several States of the business of insurance." 15 U.S.C. § 1011. Section 2(a) of the McCarran-Ferguson Act states that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business" (*id.* § 1012(a)), and thereby "assure[s] that the States are free to regulate insurance companies without fear of Commerce Clause attack." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218 n.18 (1979). Section 2(b) of the Act saves state laws "enacted . . . for the purpose of regulating the business of insurance" from preemption by generally applicable federal laws that do not "specifically relate[ ] to the business of insurance." 15 U.S.C. § 1012(b). These provisions "turn[ed] back the clock, to assure that the activities of *insurance companies in dealing with their policyholders* would remain subject to state regulation." *SEC v. Nat'l Sec. Inc.*, 393 U.S. 453, 459 (1969) (emphasis added).

2. The Viatical and Life Settlement Market

Petitioner Life Partners is a viatical and life settlement provider headquartered and licensed to do business in Texas. The viatical settlement industry emerged out of the AIDS crisis of the early 1980s, when terminally ill patients no longer able to support themselves began to look for ways to sell the right to receive benefits under their life insurance policies to third-party purchasers to pay for essential medical care and other end-of-life expenses. Pet. App. 6a.

This Court has long recognized the right of insureds to sell the benefits due under their life insurance policies to third parties as personal property (*see Grigsby v. Russell*, 222 U.S. 149, 156 (1911)), and to enter into such transactions out of state without regulation from their home States. *See N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 376-77 (1918). In a viatical settlement transaction, the insured—known as the "viator"—sells the right to receive benefits due under his life insurance policy to a third-party purchaser at a price below the policy's face value; the purchaser then continues to pay the premium to the insurer, designates itself the policy's beneficiary, and collects the policy's benefit upon the insured's death. Pet. App. 6a. The purchaser, or group of purchasers, typically employs the services of a viatical settlement "provider" to represent it, and pays the provider a fee for facilitating the transaction and providing certain ministerial services related to the policy's administration. *Id.* Life Partners serves as the purchaser's agent when facilitating the purchase of a viatical settlement.

The viatical settlement market has experienced tremendous growth in recent years and has ex-

panded to include not only traditional viatical settlements with insureds who have a life expectancy of less than two years but also "life settlements" with senior citizens who have longer life expectancies. *See* Charles Duhigg, *Late in Life, Finding a Bonanza in Life Insurance*, N.Y. TIMES, Dec. 17, 2006 ("Hedge funds, financial institutions like Credit Suisse and Deutsche Bank, and investors like Warren E. Buffett are spending billions to buy life insurance policies from the elderly."). According to the Fourth Circuit, "[i]t is estimated that $13 billion worth of life insurance policies were sold by policyholders to providers in 2005—up from $5 million in 1989 and $200 million in 1998—and it is projected that by 2030 the number could reach $160 billion." Pet. App. 7a. The federal government itself has stimulated the viatical settlement market by amending the Internal Revenue Code to exclude the proceeds of a viatical settlement from the viator's taxable income. 26 U.S.C. § 101(g)(2).

The growth of this market spurred state efforts to regulate viatical and life settlements to ensure that insureds are treated fairly when selling their policy benefits. Approximately 38 States have enacted various versions of the Viatical Settlements Model Act developed by the National Association of Insurance Commissioners ("NAIC"), or similar model legislation drafted by the National Conference of Insurance Legislators. Pet. App. 8a.

As a business incorporated and headquartered in Texas, Life Partners is subject to the Texas law governing viatical and life settlements. Tex. Ins. Code §§ 1111.001–.053. Together with its implementing regulations, that statute requires Life Partners to obtain a license from the Texas Department of Insurance as a viatical settlement provider (28 Tex.

Admin. Code § 3.1703), submit its settlement contracts to the Department for approval prior to use (*id.* § 3.1706), provide specified disclosures to viators prior to completion of the transaction (*id.* § 3.1709), include specified language in settlement applications and contracts (*id.* § 3.1710), and pay just compensation to viators (*id.* § 3.1710(c)(6)). Life Partners is duly licensed under Texas law and conducts its business in full compliance with the requirements of the Texas statute and regulations.

Life Partners has no offices or employees in Virginia and thus has not obtained a license under the Virginia Viatical Settlements Act, which is based on the NAIC Model Act and imposes requirements on viatical settlement providers that differ in several respects from those under Texas law. Va. Code §§ 38.2-6000 to -6016. The Virginia Act requires registration and annual renewal in order to "act as a viatical settlement provider with a resident of th[e] Commonwealth," and therefore applies to transactions that Virginia residents enter into both inside and outside the Commonwealth. *Id.* § 38.2-6002. To become licensed as a viatical settlement provider by the Virginia State Corporation Commission, a provider must either deposit $100,000 into the Commonwealth's treasury or post a $100,000 surety bond. 14 Va. Admin. Code § 5-71-31. The viatical settlement contracts and disclosure forms used by providers must be submitted to the Commission for review and approval (Va. Code § 38.2-6003), and must include certain language specified by the Act and its implementing regulations. *Id.* § 38.2-6011; 14 Va. Admin. Code §§ 5-71-35, 5-71-90. Advertising by viatical settlement providers is subject to content restrictions, including all "Internet advertising viewed by persons located in th[e] Commonwealth."

Va. Code § 38.2-6010(A). The Act also establishes minimum prices that viatical settlement providers must pay for policies: 80% of the policy's face value where the viator has less than six months to live, 70% of the face value where the viator has at least six but less than twelve months to live, 65% where the viator has at least twelve but less than eighteen months to live, and 60% for a life expectancy of between eighteen and twenty-four months. 14 Va. Admin. Code § 5-71-60.

The onerous registration requirements and artificial price floors established by the Virginia Viatical Settlements Act have greatly diminished the market in viatical settlements with Virginia residents. Between 2001 and 2004, there were, on average, less than two reported viatical settlements transacted each year in compliance with Virginia's regulations. C.A. J.A. 221, 436-37. Only one was transacted in all of 2003 and 2004. *Id.* at 221. By comparison, more than 170 Virginia residents sold the right to receive benefits under their life insurance policies to out-of-state purchasers from 1995 to 2001. *Id.* at 223.

3. Life Partners' Lawsuit

This suit arose out of a viatical settlement transaction between Life Partners and "Jane Doe," a resident of Virginia who is terminally ill with AIDS and who, at the time, was believed to have a life expectancy of six to eighteen months. Pet. App. 4a. Using the Internet, Jane Doe retained a New Jersey-based broker to assist her in identifying a purchaser for her $115,000 life insurance policy. *Id.* at 12a. That broker contacted Life Partners in Texas and asked it to locate purchasers interested in Jane Doe's policy. *Id.* Life Partners assembled a group of twelve purchasers from seven States—none of whom was from Vir-

ginia—willing to bid on the policy, and acted as an agent for those purchasers in the ensuing transaction. *Id.* at 13a.

On behalf of Jane Doe, the New Jersey broker rejected the first two bids received, but finally accepted the third offer of $29,900 (Pet. App. 13a), which "was consistent with the prevailing market prices at the time of the transaction for an individual with her life expectancy." C.A. J.A. 225. Life Partners sent the contract and disclosures mandated by Texas law to Jane Doe in Virginia, who mailed the completed forms back to Life Partners in Texas and thereafter received the agreed-upon funds from an independent Texas escrow agent. Pet. App. 13a.

Five months after the transaction was completed, Jane Doe contacted Life Partners and requested the minimum payment established by the Virginia Viatical Settlements Act, which, depending upon Jane Doe's precise life expectancy, would have been several times higher than the price that Jane Doe initially accepted. Pet. App. 13a. Life Partners declined to pay the additional money requested by Jane Doe on the ground that, as a Texas viatical settlement provider, it was not subject to the minimum price controls set by the Virginia Act. *Id.* It nevertheless offered to rescind the agreement, even though the rescission period under both Texas and Virginia law had lapsed. *Id.* Jane Doe rejected that offer and instead filed a complaint with the Virginia Bureau of Insurance. *Id.*

After an investigation, the Bureau concluded that Life Partners had acted as an unlicensed viatical settlement provider with a Virginia resident. Pet. App. 14a. The State Corporation Commission issued a "rule to show cause" requiring Life Partners

to explain why it had not obtained a Virginia license and threatening it with prosecution in the event of further violations. *Id.*

Life Partners responded by filing suit in the United States District Court for the Eastern District of Virginia seeking a declaratory judgment that, as applied to Life Partners' transaction with Jane Doe, the Virginia Viatical Settlements Act violates the dormant Commerce Clause and an injunction prohibiting the State Corporation Commission from enforcing the Act against it. Pet. App. 14a.

On summary judgment, the district court rejected Life Partners' dormant Commerce Clause challenge, without addressing the Commission's argument that the McCarran-Ferguson Act insulated the Virginia Viatical Settlements Act from the dormant Commerce Clause's restrictions. Pet. App. 70a. The court concluded that the Act "neither discriminates against interstate commerce" nor imposes an undue burden on interstate transactions. *Id.* at 63a.

4. The Decision Below

The Fourth Circuit affirmed on the ground that the McCarran-Ferguson Act shields the Virginia Viatical Settlements Act from dormant Commerce Clause scrutiny, and did not reach the underlying Commerce Clause issue. Pet. App. 5a.

The Fourth Circuit fashioned at least three different, and alternative, standards for determining whether a state law is saved from the dormant Commerce Clause by the McCarran-Ferguson Act.

First, the court held that the Virginia Viatical Settlements Act "relate[s] to the regulation" of the "business of insurance" under Section 2(a) of the McCarran-Ferguson Act because it "regulate[s] the new ordering of the tripartite insurance arrange-

ment involving the insurer, the insured, and the viatical settlement provider." Pet. App. 27a.

Second, the Fourth Circuit drew upon this Court's standard for determining whether a state law is saved from federal preemption by Section (2)(b) of the McCarran-Ferguson Act. Citing *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993), the court held that the Virginia Viatical Settlements Act was "enacted 'for the purpose of regulating the business of insurance'" within the meaning of Section 2(b) because, whether or not a viatical settlement itself constitutes the "business of insurance," the Virginia Act "'manages' and 'controls' the relationship between the insurer and the insured and is 'aimed at protecting or regulating' that relationship." Pet. App. 30a (quoting *Fabe*, 508 U.S. at 505).

Third, the Fourth Circuit invoked the standard for defining "insurance" under the preemption savings clause of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(b)(2)(A), asserting that "any understanding of the scope of what amounts to the business of insurance must be based on the 'commonsense understanding' of whether the business relates to or affects 'the risk pooling arrangement between the insurer and insured.'" Pet. App. 22a (quoting *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341-42 (2003)). Finding this standard also to be satisfied, the Court concluded that "the McCarran-Ferguson Act saves the [Virginia Viatical Settlements Act] from any dormant Commerce Clause challenge." *Id.* at 34a.

REASONS FOR GRANTING THE PETITION

"Defining 'insurance' for McCarran-Ferguson purposes has been an enduring problem" for lower courts. *Adams v. Plaza Fin. Co.*, 168 F.3d 932, 942

(7th Cir. 1999) (Easterbrook, J., dissenting). This case is the ideal vehicle for this Court to reconcile the circuits' conflicting interpretations of the McCarran-Ferguson Act and to ensure that States do not invoke the Act to shield laws from the dormant Commerce Clause that regulate business activity only peripheral to the "business of insurance."

The Fourth Circuit's holding that the McCarran-Ferguson Act insulates the Virginia Viatical Settlements Act from the requirements of the dormant Commerce Clause squarely conflicts with decisions from the Fifth, Sixth, and Eighth Circuits limiting the scope of the McCarran-Ferguson Act to state laws that regulate transactions between insurers and insureds. These courts have recognized that only those state laws that "regulat[e] a practice that is an integral part of the policy relationship between the insurer and the insured" are encompassed by the McCarran-Ferguson Act (*Genord v. Blue Cross & Blue Shield of Mich.*, 440 F.3d 802, 808 (6th Cir. 2006)), and that laws pertaining to transactions between an insurer or insured and a third party—such as a health-insurance company's relationship with health-care providers (*Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 154 F.3d 812, 830 (8th Cir. 1998)) or an automobile insurance company's relationship with manufacturers of automobile parts (*Liberty Glass Co. v. Allstate Ins. Co.*, 607 F.2d 135, 137 (5th Cir. 1979))—do not regulate the "business of insurance." The Virginia Viatical Settlements Act regulates transactions that involve an insured and a third-party viatical settlement provider and from which the insurer itself is excluded. The Fourth Circuit's holding that the Virginia law regulates the "business of insurance" under the McCarran-Ferguson Act therefore cannot be reconciled with the

decisions from other circuits confining the McCarran-Ferguson Act to the regulation of insurer-insured transactions.

The Fourth Circuit's decision is also in direct conflict with this Court's own McCarran-Ferguson jurisprudence. Beginning with *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), this Court has recognized that "the focus" of the term "business of insurance" is "on the relationship between the insurance company and the policyholder" (*id.* at 460), and has therefore excluded from the scope of the McCarran-Ferguson Act state laws that do not regulate the insurer-insured relationship. The Fourth Circuit's holding that transactions between insureds and third-party purchasers represented by viatical and life settlement providers are part of the "business of insurance" expands the McCarran-Ferguson Act well beyond the limitations established in *National Securities* and its progeny.

This Court's review is urgently needed because the Fourth Circuit's decision will have profound implications for the multibillion-dollar viatical and life settlement market—and for the national economy, more broadly. The dormant Commerce Clause ensures the free flow of commerce among the States and prevents States from enacting laws that discriminate against interstate commerce in favor of intrastate transactions. The Fourth Circuit's expansive reading of the McCarran-Ferguson Act, however, shields from dormant Commerce Clause scrutiny any state law that regulates interstate transactions even tangentially connected to the insurance business. Thus, not only does that decision expose transactions between insureds and viatical and life settlement providers to discriminatory and unduly burdensome state laws, but it also potentially re-

moves dormant Commerce Clause restrictions on a vast number of other state laws regulating transactions between insurers or insureds and third parties. In so doing, it authorizes States to impose burdensome restrictions on the ability of terminally ill patients and senior citizens to alienate their insurance benefits to out-of-state purchasers.

This Court should grant certiorari to ensure that States do not utilize the McCarran-Ferguson Act as a basis for enacting parochial laws that impede interstate transactions with only a tenuous link to the "business of insurance."

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' INTERPRETATIONS OF THE "BUSINESS OF INSURANCE" UNDER THE MCCARRAN-FERGUSON ACT.

The Fourth Circuit's holding that the Virginia Viatical Settlements Act regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act directly conflicts with other circuits' holdings that the "business of insurance" is limited to transactions between an insurer and an insured and does not extend to business transacted with third parties to the insurer-insured relationship.

A. This Court has explained that the "focus" of the "business of insurance" is "on the relationship between the insurance company and the policyholder." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 460 (1969). On that basis, at least three circuits have held that the McCarran-Ferguson Act does not apply to state laws that regulate transactions that insurers or insureds enter into with third parties.

In *Prudential Insurance Co. of America v. National Park Medical Center, Inc.*, 154 F.3d 812 (8th Cir. 1998), for example, the Eighth Circuit held that

the Arkansas Patient Protection Act, which requires health-insurance companies to include in their plans any health-care provider willing and able to meet the plan's requirements, does not regulate the "business of insurance" within the meaning of the McCarran-Ferguson Act because the Patient Protection Act's "connection to the insurer-insured relationship is attenuated at best." *Id.* at 830 (internal quotation marks omitted). The court emphasized that the Arkansas Act does not "define the terms of the relationship between the insurer and the insured, but only the terms of the relationship between the insurer and a third party, and hence is no more 'integral' to the insurer-insured relationship than any contract an insurer might make with any other third party." *Id.* (internal quotation marks omitted).

Similarly, in *Genord v. Blue Cross & Blue Shield of Michigan*, 440 F.3d 802 (6th Cir. 2006), the Sixth Circuit held that a Michigan statute that regulated the terms of reimbursement agreements between health insurers and health-care providers did not pertain to the "business of insurance" under the McCarran-Ferguson Act, and therefore did not foreclose a claim against an insurer under the federal Racketeer Influenced and Corrupt Organizations Act. *Id.* at 809. The court emphasized that the "reimbursement provisions of the [Michigan] Health Care Act do not have the aim of regulating a practice that is an integral part of the policy relationship between the insurer and the insured" because they are directed at the business relationship between the insurer and third-party health-care providers. *Id.* at 808. "[P]olicyholders are unconcerned with the reimbursement arrangements between Blue Cross and the doctors," the court explained, "so long as they receive medical treatment as contemplated by their

agreement with Blue Cross." *Id.*; *see also Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 942 (6th Cir. 1997) (a statute does not regulate the "business of insurance" unless it "affect[s] the substantive terms of the contract" between the insurer and insured).

The Fifth Circuit has also recognized the distinction that the McCarran-Ferguson Act draws between the regulation of insurer-insured agreements and the regulation of agreements involving either an insurer or an insured and a third party. In *Liberty Glass Co. v. Allstate Insurance Co.*, 607 F.2d 135 (5th Cir. 1979), the court held that an agreement between automobile insurers and a manufacturer/installer of automobile replacement glass was not exempt from the federal antitrust laws as part of the "business of insurance" under the McCarran-Ferguson Act because "the business of insurance does not encompass agreements between insurers and third party providers of goods and services." *Id.* at 137.

B. The Fourth Circuit's conclusion that the Virginia Viatical Settlements Act regulates the "business of insurance" under Section 2(a) of the McCarran-Ferguson Act is directly at odds with these decisions from the Fifth, Sixth, and Eighth Circuits.

The Virginia Viatical Settlements Act regulates the negotiation and substantive terms of agreements that insureds enter into with third-party purchasers who are strangers to the insurer-insured relationship. Indeed, insurance companies are expressly forbidden from providing viatical settlement services (Va. Code § 38.2-6002(F)), and are not a party to viatical settlement agreements that pertain to policies they have issued. A viatical settlement agreement does not alter the substantive terms of the preexisting insurance contract between the insurer and in-

sured, and—as the D.C. Circuit has held—is not itself "an insurance policy." *SEC v. Life Partners, Inc.*, 87 F.3d 536, 542 (D.C. Cir. 1996). The agreement simply transfers from the viator to the purchaser the right to receive benefits under the existing policy and the obligation to pay premiums on that policy.

It is impossible to reconcile the Fourth Circuit's holding that the Virginia Viatical Settlements Act regulates the "business of insurance" with those decisions in which other circuits have held that only laws that "define the terms of the relationship between the insurer and the insured," rather than the terms of the relationship between the insurer or insured and a third party, regulate the "business of insurance." *Prudential Ins. Co. of Am.*, 154 F.3d at 830 (internal quotation marks omitted). In the Fifth, Sixth, and Eighth Circuits, the insurer-insured relationship is the touchstone of the "business of insurance," and courts in each of those circuits would therefore conclude that the Virginia Viatical Settlements Act (or one of the thirty-seven other state viatical settlements acts) does not regulate the "business of insurance" because it regulates contracts between insureds and third-party purchasers, rather than between insurers and insureds. In direct conflict with the McCarran-Ferguson Act jurisprudence of these circuits, the Fourth Circuit held that the term "business of insurance" is sufficiently broad to encompass transactions between an insured and a third party to the insurer-insured relationship.

This deep division in authority creates intolerable regulatory uncertainty for viatical and life settlement providers. Because "a clear definition of the phrase 'business of insurance' does not exist," viatical and life settlement providers—as well as state regulators and other companies that transact business

with insurers and insureds—are left to guess as to whether a particular commercial transaction with a tangential connection to insurance is encompassed by the McCarran-Ferguson Act. Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance*, 33 SAN DIEGO L. REV. 583, 660 (1996).

Indeed, while Life Partners has been told by the Fourth Circuit that it is engaged in the "business of insurance" when it facilitates the purchase of an insurance policy from an insured, it has been told by the D.C. Circuit that it is *not* engaged in the "business of insurance" when it represents purchasers taking fractionalized interests in the same transaction. *Life Partners, Inc.*, 87 F.3d at 542. Life Partners has also been told that viatical settlements are not the "business of insurance" by a district court in the Fifth Circuit, *see Life Partners, Inc. v. Life Ins. Co. of N. Am.*, 1998 U.S. Dist. LEXIS 23544, at *8 (W.D. Tex. 1998), *aff'd on other grounds*, 203 F.3d 324 (5th Cir. 1999), and by the Securities and Exchange Commission. *See* Reply Brief in Support of Motion for Preliminary Injunction and Other Provisional Relief at 7, SEC v. Life Partners, Inc. (D.D.C. filed Oct. 28, 1994) (No. 1:94CV01861) ("because the McCarran-Ferguson Act applies only to state laws pertaining to the 'business of insurance,' state laws regulating viatical settlements are not within the Act"). The courts of Texas have also held that viatical settlements are not insurance transactions, and Life Partners has conformed its business to the law of its home State. *See Employers Reinsurance Corp.*

v. Threlkeld & Co. Ins. Agency, 152 S.W.3d 595, 598-99 (Tex. App. 2003).[1]

Life Partners and other viatical and life settlement providers cannot develop long-term business plans and ensure regulatory compliance—and States cannot effectively administer their regulatory programs—in the midst of such legal uncertainty. This Court's review is required to reconcile the lower courts' sharply divergent understandings of the McCarran-Ferguson Act.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S INTERPRETATIONS OF THE "BUSINESS OF INSURANCE" UNDER THE MCCARRAN-FERGUSON ACT.

The decision below not only conflicts with other circuits' interpretations of the McCarran-Ferguson Act, but it also is squarely at odds with this Court's own McCarran-Ferguson jurisprudence. Certiorari is warranted to reconcile the Fourth Circuit's decision with this Court's prior interpretations of the "business of insurance" under the McCarran-Ferguson Act.

A. This Court has repeatedly limited the scope of the McCarran-Ferguson Act to state laws that directly regulate the insurer-insured relationship. In *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the Court held that an Arizona law requiring the state insurance director to approve the merger of two

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[1] *But see Nat'l Viatical, Inc. v. Oxendine*, 2006 U.S. Dist. LEXIS 25851, at *6 (N.D. Ga. 2006) (rejecting a dormant Commerce Clause challenge to the Georgia Life Settlements Act on the ground that the McCarran-Ferguson Act shields the state statute from the dormant Commerce Clause's requirements), *aff'd without opinion*, 221 F. App'x 899 (11th Cir. 2007).

insurance companies as not "inequitable to the stockholders" did not pertain to the "business of insurance"—and therefore did not render the federal securities laws inapplicable to the merger—because the State was "attempting to regulate not the 'insurance' relationship, but the relationship between a stockholder and the company in which he owns stock." *Id.* at 457, 460.

The Court explained that, in enacting the McCarran-Ferguson Act, "Congress was concerned with the type of state regulation that centers around the contract of insurance." *Nat'l Sec., Inc.*, 393 U.S. at 460. "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement," the Court continued, are "the core of the 'business of insurance'" under the McCarran-Ferguson Act. *Id.* The Court reasoned that "whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder." *Id.* Because the focus of the Arizona statute was not on the relationship between the insurer and the insured—but rather on the relationship between the insurance company and its stockholders—the Court concluded that it did not regulate the "business of insurance." *Id.*

Similarly, in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), this Court held that agreements between health-insurance companies and pharmacies regarding the price of prescription drugs for the providers' members did not constitute part of the "business of insurance" for McCarran-Ferguson Act purposes and thus were not exempt from the federal antitrust laws. *Id.* at 217. In reaching this conclusion, the Court emphasized that the agreements were not "'between insurer and

insured'" but were instead "separate contractual arrangements between [the insurer] and pharmacies engaged in the sale and distribution of goods and services other than insurance." *Id.* at 216 (quoting *Nat'l Sec., Inc.*, 393 U.S. at 460). The Court explained that "the underwriting or spreading of risk is a critical determinant in identifying insurance" and that the pharmacy agreements did "not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by" the insurer. *Id.* at 213-14.

Finally, in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), the Court synthesized its earlier interpretations of the McCarran-Ferguson Act into a three-part test for determining whether an activity constitutes the "business of insurance": "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Id.* at 129. Employing this standard, the Court held that the activities of a "peer review" committee of chiropractors that advised an insurance company whether chiropractic treatment for which coverage was claimed was "necessary" and "reasonable" did not constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act and were therefore subject to the federal antitrust laws. *Id.* at 134.

The Court explained that the peer-review process did not spread risk because the "transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered." *Pireno*, 458 U.S. at 130. The Court

also determined that the use of a peer review committee was not an "integral part" of the policy relationship because the "challenged arrangement between [the insurance company] and [the chiropractic association] is obviously distinct from [the insurance company's] contracts with its policyholders." *Id.* at 131. The insurance company's use of the peer-review committee constituted a "separate arrangement between the insurer and third parties not engaged in the business of insurance." *Id.* Lastly, the Court concluded that the peer-review process was not limited to entities within the insurance industry because it "involve[d] third parties wholly outside" that industry. *Id.* at 132.

B. The Fourth Circuit's holding that the Virginia Viatical Settlements Act regulates the "business of insurance" squarely conflicts with this Court's decisions in *National Securities*, *Royal Drug*, and *Pireno*.

Viatical settlement agreements possess none of the indicia of the "business of insurance" that the Court identified in *Pireno* and distilled from its holdings in *National Securities* and *Royal Drug*. Viatical settlement agreements do not spread the viator's risk because risk spreading "is complete at the time that the [insurance] contract is entered." *Pireno*, 458 U.S. at 130. When an insured enters into an insurance contract, he transfers his risk of an early death to the insurance company; that risk remains with the insurance company after the consummation of a viatical settlement agreement, which merely transfers the policy's death benefit to the third-party purchaser.

Moreover, viatical settlements are not an "integral part" of the insurer-insured relationship because—like the merger in *National Securities*, the

pharmacy agreement in *Royal Drug*, and the peer-review process in *Pireno*—they involve a "separate contractual arrangement[ ]" from the insurance contract between the insurer and the insured. *Royal Drug Co.*, 440 U.S. at 216. Viatical settlements are therefore well outside the "focus" of the "business of insurance"—"the relationship between the insurance company and the policyholder." *Nat'l Sec., Inc.*, 393 U.S. at 460; *cf. Pireno*, 458 U.S. at 133 ("Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of [the McCarran-Ferguson Act's] legislative concern.").

Furthermore, viatical settlements are not limited to entities within the insurance industry because viatical settlement providers are not insurance companies. Indeed, Virginia law prohibits insurance companies from acting as viatical settlement providers (Va. Code § 38.2-6002(F)) and explicitly acknowledges the distinction between the business of insurance and the business of viatical settlements. *See id.* § 38.2-6000 (referring to "person[s] engaged in the business of viatical settlements *or insurance*") (emphasis added).

The Fourth Circuit's decision disregards each of this Court's guidelines for defining the "business of insurance" by extending the McCarran-Ferguson Act to viatical settlement agreements that do not spread risk, that do not include both the insurer and the insured, and that involve third-party viatical settlement providers who are not part of the insurance industry. This Court's review is warranted to reinforce the limitations on the reach of the McCarran-

Ferguson Act recognized in *National Securities* and its progeny.[2]

C. This Court should also grant review to clarify the relationship between its decisions in *National Securities*, *Royal Drug*, and *Pireno*, on the one hand, and its later decision in *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993), on the other—an issue with which "[m]any . . . courts have struggled." *Autry v. Nw. Premium Servs., Inc.*, 144 F.3d 1037, 1044 n.5 (7th Cir. 1998).

In *Fabe*, a sharply divided Court held that a state-law provision that gave priority to policyholders in insurance companies' insolvency proceedings was enacted for "the purpose of regulating the business of insurance" within the meaning of Section 2(b) of the McCarran-Ferguson Act and therefore was not preempted by a federal statute giving priority to the federal government's claims. 508 U.S. at 508. The Court explained that "federal law must yield" because the state-law priority provision "further[ed] the interests of policyholders." *Id.* at 502.

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[2] Moreover, the Fourth Circuit's analysis is flawed for the additional reason that it relies, at least in part, on Section 2(b) of the McCarran-Ferguson Act, which saves from federal preemption those state laws enacted "for the purpose of regulating the business of insurance," and on the standard for identifying laws that "regulate insurance" under ERISA's preemption savings clause. This Court has held that it is Section 2(a)—not Section 2(b)—of the McCarran-Ferguson Act that "operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack." *Royal Drug Co.*, 440 U.S. at 218 n.18. Furthermore, in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), the Court effected a "clean break" between McCarran-Ferguson and ERISA, and held that different standards should be used to define the term "insurance" under each statute. *Id.* at 341.

The Court's focus in *Fabe* on benefit to policyholders in defining the "business of insurance" is in tension with its narrower focus in *National Securities*, *Royal Drug*, and *Pireno* on the insurer-insured relationship and the insurance contract. Indeed, as the dissent in *Fabe* identified, if taken at face value, the Court's decision would mean that "any law which redounds to the benefit of policyholders is, *ipso facto*, a law enacted to regulate the business of insurance." *Fabe*, 508 U.S. at 511 (Kennedy, J., dissenting). That expansive conception of the McCarran-Ferguson Act's scope is difficult to reconcile with this Court's earlier decisions. *See id.* at 512 ("The majority's broad holding is not a logical extension of our decision in *National Securities* and indeed is at odds with it.").

The difficulty that lower courts traditionally experienced defining the "business of insurance" has been exacerbated by *Fabe*'s evident inconsistency with previous interpretations of the McCarran-Ferguson Act. *See, e.g.*, *Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 839 (6th Cir. 1996) ("It is not clear from the majority opinion in *Fabe* how far its holding extends."); *Ruthardt v. United States*, 303 F.3d 375, 381 (1st Cir. 2002) ("If and when the next case reaches the Supreme Court, the dissenting position in *Fabe* could prevail. That position may be closer to the mainstream of prior Court cases on the McCarran-Ferguson Act . . . .").

The lower courts' difficulty implementing *Fabe* is not merely hypothetical. One particularly intractable area of confusion among the lower courts is whether *Fabe* requires application of *Pireno*'s three-part "business of insurance" test when determining whether a law was enacted for "the purpose of regulating the business of insurance" within the meaning

of Section 2(b) of the McCarran-Ferguson Act. *Compare Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 191 n.3 (3d Cir. 1998) (holding that the *Pireno* factors do apply), *Genord v. Blue Cross & Blue Shield of Mich.*, 440 F.3d 802, 806 (6th Cir. 2006), *and Blackfeet Nat'l Bank v. Nelson*, 171 F.3d 1237, 1246 n.13 (11th Cir. 1999), *with Autry v. Nw. Premium Servs. Inc.*, 144 F.3d 1037, 1044 n.5 (7th Cir. 1998) (holding that the *Pireno* factors do not apply), *and Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1305 n.8 (8th Cir. 1997).

In light of the Fourth Circuit's reliance upon both Sections 2(a) and 2(b) of the McCarran-Ferguson Act in its analysis, this case provides the Court with an ideal opportunity to resolve the widespread confusion regarding the scope of the "business of insurance" under the McCarran-Ferguson Act and to clarify the relationship between *Fabe* and earlier precedent.

III. This Case Raises An Issue Of Exceptional Importance To The Viatical And Life Settlement Market.

This case has profound ramifications for the viatical and life settlement market and for thousands of other businesses—from health-care providers, pharmacies, and nursing homes, to autobody repair shops and manufacturers of automobile parts—that contract with insurers and insureds in the life, health, and automobile insurance contexts. The Fourth Circuit's decision extends the McCarran-Ferguson Act to encompass state laws that regulate businesses with only a peripheral connection to the insurance industry, and shields such laws—no matter how discriminatory or burdensome—from dormant Commerce Clause scrutiny. The implications of that decision for the multibillion-dollar viatical and life set-

tlement market—and for interstate commerce, more broadly—are far-reaching and potentially devastating.

The dormant Commerce Clause "protects free trade among the States" (*Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)) by "prohibit[ing] certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992). The McCarran-Ferguson Act, however, "remove[s] all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance." *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981). The Fourth Circuit's holding that the Virginia Viatical Settlements Act regulates the "business of insurance" under the McCarran-Ferguson Act therefore exposes viatical settlement providers to all manner of state laws discriminating against out-of-state providers and burdening the interstate viatical and life settlement market.

Under the Fourth Circuit's expansive interpretation of the McCarran-Ferguson Act, for example, there would be no constitutional impediment to Virginia enacting a tax that required out-of-state viatical and life settlement providers to pay a higher rate than in-state providers or that provided in-state companies with certain deductions not available to their out-of-state counterparts. And, beyond the viatical and life settlement context, Virginia could impose blatantly discriminatory taxes on any out-of-state company engaged in a business tangentially related to an insurance product. Such discriminatory taxes would be flatly unconstitutional under the dormant Commerce Clause. *See Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 192 n.6 (1995) (this Court has "never upheld a tax in the face of a

substantiated charge that it provided credits for the taxpayer's payment of in-state taxes but failed to extend such credit to payment of equivalent out-of-state taxes"). Under the Fourth Circuit's reading of the McCarran-Ferguson Act, however, those taxes would be completely insulated from the dormant Commerce Clause's requirements.

The Virginia Viatical Settlements Act has an effect on interstate commerce that is equally as pernicious as the effect of the discriminatory taxes hypothesized above. The Act imposes extensive licensing requirements—including a requirement that a viatical settlement provider post a $100,000 bond with the Commonwealth and pay annual license renewal fees—upon any viatical settlement provider that does business with a Virginia resident, even if the provider has no other contacts with the Commonwealth and the Virginia resident enters into the viatical settlement while in another State. Va. Code § 38.2-6002; 14 Va. Admin. Code § 5-71-31. There is also a significant likelihood that the requirements that Virginia imposes on out-of-state viatical settlement providers will conflict with the requirements imposed on the provider by the laws of the State in which it is headquartered. For example, Texas law prohibits providers from facilitating purchases from a seller represented by a broker who does not owe its sole fiduciary duty to the seller. 28 Tex. Admin. Code § 3.1711. Virginia law provides, however, that, in all but a few rare circumstances, a broker does not serve as the seller's fiduciary. Va. Code § 38.2-6000; 14 Va. Admin. Code § 5-71-50. These conflicting laws effectively preclude a Texas provider from representing parties who wish to purchase the life insurance benefits of a Virginia resident.

Such impediments to interstate commerce are squarely prohibited by the dormant Commerce Clause, which "prevent[s] a State from retreating into economic isolation" (*Jefferson Lines, Inc.*, 514 U.S. at 180) by imposing unwarranted burdens on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The burden imposed by the Virginia Viatical Settlements Act is evident from the fact that the Act has largely extinguished the Virginia market for viatical settlements, reducing to single digits the average number of settlements executed each year. C.A. J.A. 221, 436-37. Because there are no viatical settlement providers headquartered in Virginia, this burden directly and substantially impacts terminally ill Virginia residents seeking to alienate the benefits of their life insurance policies in interstate commerce to pay for essential medical care and other end-of-life expenses. *Id.* at 188.

It is therefore exceptionally important to the viatical and life settlement market—as well as to the millions of senior citizens who may desire to sell their policy benefits and the financial institutions that have already invested billions of dollars in alienated life insurance policies—that this Court review the Fourth Circuit's conclusion that the Virginia Viatical Settlements Act falls within the scope of Section 2(a) of the McCarran-Ferguson Act. In the absence of review, the industry's interstate transactions will continue to be subject to onerous—and conflicting—state-law requirements that have little to do with the regulation of the "business of insurance" and that are far removed from the type of laws that Congress intended to shield from the dormant Commerce Clause when it enacted the McCarran-Ferguson Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 27, 2007